constitutionality of the Act on its face and as applied. The court's analysis focused on the second Morrison factor, the jurisdictional element involving interstate activity. The Sixth Circuit, in discussing the jurisdictional element of the Act, wrote as follows:

> The statute facially has an extremely wide sweep. Although commentators have generally spoken in terms of film or computers, the statutory terms have no such limitation. A painter using a model who was just under 18, even if it was his wife, would fall afoul of the statute if the paints, brushes, or canvas had traveled in interstate

---

that substantially affect interstate commerce. Lopez, 514 U.S. at 558-59. This Court held the statute to be unconstitutional because the statute contained "no jurisdictional element that would ensure, through case-by-case inquiry, that the firearm possession in question affects interstate commerce." Id. at 561.

[2] United States v. Morrison, 529 U.S. 598, 120 S. Ct. 1740, 146 L. Ed. 2d 658 (2000), striking down the civil remedy provision of the Violence Against Women Act. This Court suggested that four questions be raised in analyzing a Commerce Clause controversy:

1) Is the prohibited activity commercial or economic in nature?
2) Is there an express jurisdictional element involving interstate activity which might limit the statute's reach?
3) Did Congress make findings about the effects of the prohibited conduct on interstate commerce?; and
4) Is the link between the prohibited activity and the effect on interstate commerce attenuated?

Morrison, 120 S. Ct. at 1750-51.

> commerce, even long before enactment of the act.

Id. at 331.

The Sixth Circuit stopped short of declaring the Act to be facially unconstitutional. Instead, it held that the defendant's "activity was not of a type demonstrated substantially to be connected or related to interstate commerce on the facts of this case." Id. at 332. The defendant clearly never intended to put the photographs into the stream of commerce either by selling or sharing the pictures with others. The result was a holding that the Act was unconstitutional as applied to the Defendant.

Where the Sixth Circuit stopped short of finding the Act to be unconstitutional, Judge Jolly, of the Fifth Circuit, made a forceful dissent from the majority's holding that the statute was wholly constitutional. See United States v. Kallestad, 236 F.3d 225, 231 (5th Cir. 2000) Judge Jolly wrote, "For whatever else it may be cited, United States v. Lopez at least stands for the proposition that purely intrastate, non-commercial possession of

a non-fungible good "is in no sense an economic activity that might, through repetition elsewhere, substantially affect any sort of interstate commerce."" (Quoting Lopez at 567). Judge Jolly's dissent points out the glaring weakness of the Act in light of the Morrison factors regarding the jurisdictional element and interstate commerce, specifically:

> I do not think the majority can so blithely assume this critical connection to interstate commerce that provides the essential authority for Congress' regulation of intrastate conduct, especially when the evidence shows that no such connection existed in the facts of this case. Indeed, the evidence shows that Kallestad did not purchase, trade, sell, or barter the pornography he possessed. Nor does the evidence show that he had any intention to ever do so.

Kallestad, 236 F.3d at 234.

What Judge Jolly was advocating in his dissent was a basic nexus between a defendant's possession of child pornography and commercial activity beyond a roll of film manufactured in one jurisdiction and used to take pictures in another. Without this basic nexus, the Sixth Circuit feared the prosecution of a painter who uses paint brushes manufactured in a different state to paint pictures of his seventeen year old wife.

Likewise, in the Ninth Circuit, the Court of Appeals made similar findings in United States v. McCoy, 323 F.3d 1114, 1115 (9th Cir. 2003), where the court held that § 2252(a)(4)(b), the analogous possession statute to § 2251(a), "is unconstitutional as applied to simple intrastate possession of a visual depiction (or depictions) that has not been mailed, shipped, or transported interstate and is not intended for interstate distribution, or for any economic or commercial use, including the exchange of the prohibited material for other prohibited material."

McCoy is a case where the defendant was charged with violations of the Act under §§§ 2251(a), 2251(b), and

2252(a)(4)(B), for the production and possession of a single photograph of the defendant posed with her daughter, "with their genital areas exposed." McCoy, 323 F. 3d at 1115. Like the defendant in the present case, the government did not allege that McCoy was a commercial producer of child pornography or that the photograph of the defendant and her daughter were "mailed, shipped, or transported in interstate or foreign commerce, nor that Rhonda [defendant] . . . intended to sell or distribute the photograph in interstate commerce." Id. at 1116. The basis for the indictment against the defendant in McCoy, like Mr. Jeronimo-Bautista, was the place of manufacture of the camera and the rolls of film.

The Ninth Circuit, in its analysis of the case under the Morrison factors, stated that the two most important factors to consider are the question of whether the activity is commercial or economic, and whether the connection between possession and interstate commerce is attenuated. Indeed, the court wrote that "an activity that is utterly lacking in commercial or economic

character would likely have too attenuated a relationship to interstate commerce and would, accordingly, not be subject to regulation under the *Commerce Clause*." Id. at 1119.

In first analyzing the nature of the activity, the Ninth Circuit commented on the government's assertion that intrastate possession of child pornography is akin to the possession and use of home grown wheat that was found to be an economic activity in Wickard v. Filburn, 317 U.S. 111, 87 L. Ed. 122, 63 S. Ct. 82 (1942). The court wrote,

> *Wickard's* "aggregation principle" does not determine the question here. In both *Lopez* and *Morrison*, the Supreme Court carefully limited the reach of *Wickard*, while affirming that decision's continued vitality. In *Lopez*, the Court approved of *Wickard's* rationale only in relation to activity the *economic* nature of was obvious. *514 U.S. at 558.* Similarly, in *Morrison*, the Court affirmed that "in every case where we have sustained federal regulation under the aggregation principle in

> *Wickard v. Filburn, 317 U.S. 111, 87 L. Ed. 122, 63 S. Ct. 82 (1942)*, the regulated activity was of an apparent commercial character." *529 U.S. at 611 n.4*. Indeed, the
>
> court commented that *Wickard* represented "'perhaps *the most far reaching example of Commerce Clause authority over intrastate activity*,'" involving "'economic activity in a way that possession of a gun in a school zone does not.'" *529 U.S. at 610* (quoting *Lopez, 514 U.S. at 560*)(emphasis added).

Id. at 1120-21. The Ninth Circuit's reading of these cases formed the basis for the holding that the Act "is unconstitutional as applied to simple intrastate possession of a visual depiction (or depictions) that has not been mailed, shipped, or transported interstate and is not intended for interstate distribution, or for any economic or commercial use." Id. at 1115.

The Ninth Circuit rejected the theory posited by the Third Circuit that mere possession or production of child pornography

for personal use amounted to an economic activity based on the "notion of addiction" that "[T]he possession of 'home grown' pornography may well stimulate a further interest in pornography that immediately or eventually animates demand for interstate pornography." Id. at 1121 (quoting United States v. Rodia, 194 F.3d 465, 477-78, n.12 (3d Cir. 1999)).[3] Moreover, as articulated by the Ninth Circuit, the photograph in McCoy is vastly different than the wheat in Wickard. The home-grown wheat in Wickard competed with the wheat in commerce, adjusting the supply and

---

[3]The Ninth Circuit further noted the importance of distinguishing between conduct affecting interstate commerce, and problems multiple states address as state issues. In support of this distinction, the Ninth Circuit quoted United States v. Bird, 124 F.3d 667, 668 n.13 (5th Cir. 1997):

> [S]imply because a type of antisocial conduct (which any state could validly proscribe) can fairly be described as a 'national' problem in the sense that many (or even all) states experience more instances of it than are desirable or desired, [does not mean that] this of itself suffices to bring such conduct within the scope of Congress's *Commerce Clause* power. Plainly it does not. Ever since a time well before the Constitutional Convention, there have been every year in each of the several states more murders than desirable or desired, but it is nevertheless plain that the *Commerce Clause* does not authorize Congress to enact legislation punishing any and all murders throughout the nation.

demand of the wheat market. In contrast, the Ninth Circuit found McCoy's photograph did not compete with other child pornography nor affect the supply or demand for child pornography throughout the United States. Id. at 1122.

The Ninth Circuit also found that the connection between McCoy's intrastate possession of child pornography and interstate commerce was "too attenuated to warrant a valid exercise of *Commerce Clause* power." Id. at 1123. Like the decisions in Lopez and Morrison, to find a link between purely intrastate, production of child pornography for personal use is sufficiently linked to interstate commerce requires the court to "pile inference upon inference in a manner that would bid fair to convert congressional authority under the *Commerce Clause* to a general police power of the sort retained by the States." Id. at 1123 (quoting Lopez, 514 U.S. at 567). This "inference upon inference" is what the other Circuits have done to find the Act constitutional.

Both the Sixth and Ninth Circuits, after making a careful analysis of the constitutionality of the statutes under United States v. Lopez, 514 U.S. 549 (1995) and United States v. Morrison, 529 U.S. 598 (2000), came to the same conclusion that the statute, as applied to the respective Defendants, was unconstitutional under the Commerce Clause.

In contrast, the remaining Circuits, including the Tenth Circuit challenged here, have held that the Act on its face and as-applied is Constitutional and in accordance with the Commerce Clause. For example, in the First Circuit decision of United States v. Morales-de Jesus, 372 F.3d 6 (1st Cir. 2004) the court found § 2251(a) reached interstate activity that substantially affected the interstate child pornography market. The "as applied" claim failed there because of "the economic nature of the class of conduct defined in the statute rather than the economic facts (such as sale or distribution) of a single case." Morales-de Jesus, 372 F.3d at 18. The First Circuit's assessment of the Act is similar to other circuits where as-applied challenges

to the Act were rejected based on a very broad reading of the Act's provision regarding materials produced outside of the state where the pornography was produced.[4] Essentially, for these circuits, the Congressional language regarding equipment and materials produced outside of the state, created an impenetrable jurisdictional hook that made as-applied challenges not worth the paper they were written on.

---

[4]See United States v. Holston, 343 F.3d 83, 90 (2 nd Cir. 2003) holding that "insofar as § 2251(a) prohibits the production of child pornography using materials that have moved in interstate commerce, it is a permissible exercise."; United States v. Galo, 239 F.3d 572, 573 (3rd Cir. 2001), holding that "Congress validly exercised its authority under the Commerce Clause in enacting § 2251(a) and 2252(a)(4)(B), and that those statutes are not unconstitutional as applied to Galo."; United States v. Buculei, 262 F.3d 322, 330 (4th Cir. 2001), holding that "we agree with the Government on this issue, and we conclude that § 2251(a) is a valid exercise of congressional authority to regulate child pornography activities affecting interstate commerce."; United States v. Kallestad, 236 F.3d 225, 230 (5th Cir. 2000), holding that "Congress can reach purely local possession if it rationally determines that doing so is necessary to effectively regulate the national markets."; United States v. Angle, 234 F.3d 326, 338 (7th Cir. 2000), holding that "we also agree with the Third Circuit that the statute was reasonably adapted to a permissible end because "there is a rational connection between the regulatory means (punishing the intrastate possession of child pornography) and the asserted end (prohibiting interstate commerce in child pornography and reducing the inevitable harm to children that stems from their involvement in child pornography)." (quoting Rodia, 194 F.3d at 481); United States v. Bausch, 140 F.3d 739, 741 (8th Cir. 1998), stating "In this case, the jury found Bausch took the photographs using a Japanese camera that had been transported in interstate or foreign commerce. See *Robinson , 1998 WL 78807*, at *1 (use of camera and film made in another state satisfies Commerce Clause). We conclude § 2252(a)(4)(B) is not beyond Congress's commerce power, and thus is not facially unconstitutional."; United States v. Jeronimo-Bautista, 425 F.3d 1266, 1271 (10th Cir. 2005), holding that "we agree with our colleagues on the First Circuit that Congress' explicit findings regarding the "extensive national market in child pornography and the need to diminish that national market" support the contention that "prohibiting the production of child pornography at the local level" helps to further the Congressional goal." (quoting Morales-de Jesus, 372 F.3d at 12).

The Sixth and Ninth Circuit have demonstrated why the sweeping application of the Act to as-applied challenges of its constitutionality are incorrect in accordance with Lopez and Morrison. Purely intrastate production or possession of child pornography should not fall under the Commerce Clause, but should be an issue of law enforcement reserved to the states.

CONCLUSIONS

This Court should grant certiorari to resolve these conflicts regarding the Commerce Clause.

RESPECTFULLY SUBMITTED this 6 day of January, 2006.

CORPORON, WILLIAMS & BRADFORD P.C.

MARY C. CORPORON
Attorney for Petitioner

APPENDIX

UNITED STATES OF AMERICA, Plaintiff-Appellant, v. VIRGILIO JERONIMO-BAUTISTA, also known as Virgilino Jeronimo, Defendant-Appellee.

No. 04-4137

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

425 F.3d 1266; 2005 U.S. App. LEXIS 21965

October 12, 2005, Filed

PRIOR HISTORY: [**1] Appeal from the United States District Court for the District of Utah. (D.C. No. 2:04-CR-81-TS). *United States v. Jeronimo-Bautista, 319 F. Supp. 2d 1272, 2004 U.S. Dist. LEXIS 10472 (D. Utah, 2004)*

COUNSEL: Michael S. Lee, Assistant United States Attorney (Paul M. Warner, United States Attorney, and Karin M. Fojtik, Assistant United States Attorney, with him on the briefs), Salt Lake City, Utah, for Plaintiff-Appellant.

Mary C. Corporon, Corporon & Williams, P.C., Salt Lake City, Utah, for Defendant-Appellee.

JUDGES: Before SEYMOUR, PORFILIO and EBEL, Circuit Judges.

OPINIONBY: SEYMOUR

OPINION: [*1267] **SEYMOUR**, Circuit Judge.

Virgilio Jeronimo-Bautista was indicted, in part, for coercing a minor to engage in sexually explicit conduct "for the purpose of producing visual depictions of such conduct . . . using materials that have been . . . transported in interstate and foreign commerce," in violation of *18 U.S.C. § 2251(a)*. The district court dismissed the charge, concluding that as applied to Mr. Jeronimo-Bautista, *§ 2251(a)* exceeded Congress' authority under the *Commerce Clause. United States v. Jeronimo-Bautista, 319 F. Supp. 2d 1272 (D. Utah 2004)*. The government appeals, and we reverse.

I

This case arises out of Mr. Jeronimo-Bautista's motion [**2] pursuant to *FED. R. CRIM. P. 12(b)(3)(B)*, in which he sought the dismissal of his indictment. He contended the district court lacked subject matter jurisdiction over the crime charged against him because the acts he allegedly committed "did not constitute any conduct impacting interstate commerce, or any subject or matter properly within the purview of the federal government." App. at 13. While Mr. Jeronimo-Bautista asserts he is actually innocent, for the purposes of our review of the district court's grant of Mr.

Jeronimo-Bautista's *Rule 12(b)(3)(B)* motion we make all factual inferences in favor of the government, assuming it could prove the facts alleged against Mr. Jeronimo-Bautista at a trial. *See United States v. Hall, 20 F.3d 1084, 1087 (10th Cir. 1994)* (citing *United States v. Sampson, 371 U.S. 75, 78-79, 9 L. Ed. 2d 136, 83 S. Ct. 173 (1962))* (allegations in indictment are treated as true when reviewing *Rule 12(b)* motion to dismiss). Accordingly, for the purposes [*1268] of this appeal only, we assume the following facts.

On January 29, 2004, Mr. Jeronimo-Bautista and two other men, while in the company of a thirteen year-old [**3] girl, entered a vacant residence in Magna, Utah. At some point the girl became unconscious, possibly after ingesting an intoxicating substance. After she lost consciousness, the three men removed her clothing, sexually assaulted her, and took photographs of their actions. The camera used to take the photographs was not manufactured in the state of Utah.

One of the men took the film to a one-hour photo lab for processing. In the course of developing the film, staff at the lab noticed images that appeared to depict the sexual assault of a minor female. The manager of the lab called the police, who viewed the photographs and then initiated an investigation resulting in the arrest and indictment of Mr. Jeronimo-Bautista. As noted by the district court, it was undisputed that Mr. Jeronimo-Bautista was a citizen of Mexico and resided in the State of Utah. *Jeronimo-Bautista, 319 F. Supp. 2d at 1274.* The victim was born in Utah and was not transported across state lines in connection with the acts charged in the indictment. *Id.* Moreover, "the photos were never disseminated, were not stored or transmitted electronically via the Internet, the United States Postal Service, [**4] nor by any other method across state lines or internationally. There is no indication that [Mr. Jeronimo-Bautista] had any intention of so transmitting or storing the images." *Id.*

The indictment charged that Mr. Jeronimo-Bautista, along with the two other men n1

> did knowingly employ, use, persuade, induce, entice, and coerce a minor . . . to engage in sexually explicit conduct for the purpose of producing visual depictions of such conduct, which visual depictions were produced using materials that have been mailed, shipped, and transported in interstate and foreign commerce, and did aid and abet each other therein,

app. at 11-12, thereby violating *§ 2251(a)* (production of child pornography) n2 and *18 U.S.C. § 2* (aiding and abetting). Mr. Jeronimo-Bautista moved to dismiss the indictment on the ground that the district court did not have subject matter jurisdiction over the acts charged against him, contending *§ 2251(a)* violated the *Commerce Clause* as applied to him. The district court agreed, concluding that Mr. Jeronimo-Bautista's charged activity "was not of a type demonstrated to be *substantially* connected or related to interstate [**5] commerce." *Jeronimo-Bautista, 319 F. Supp. 2d at 1282*. This case is now before us on the government's appeal.

n1 Mr. Jeronimo-Bautista's co-defendants are not parties to this appeal.

n2 *18 U.S.C. § 2251(a)* reads in full:

> Any person who employs, uses, persuades, induces, entices, or coerces any minor to engage in, or who has a minor assist any other

person to engage in, or who transports any minor in interstate or foreign commerce, or in any Territory or Possession of the United States, with the intent that such minor engage in, any sexually explicit conduct for the purpose of producing any visual depiction of such conduct, shall be punished as provided under [this statute], if such person knows or has reason to know that such visual depiction will be transported in interstate or foreign commerce or mailed, if that visual depiction was produced using materials that have been mailed, shipped, or transported in interstate or foreign commerce by any means, including by computer, or if such visual depiction has actually been transported in interstate or foreign commerce or mailed.

[**6]

II

We review "challenges to the constitutionality of a statute *de novo*." [*1269] *United States*

v. Dorris, 236 F.3d 582, 584 (10th Cir. 2000). The United States Constitution grants to Congress the "Power to . . . regulate Commerce . . . among the several States." *U.S. CONST. art I, § 8, cl. 3.* As relevant here, "Congress' commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce, *i.e.*, those activities that substantially affect interstate commerce." *United States v. Lopez, 514 U.S. 549, 558-59, 131 L. Ed. 2d 626, 115 S. Ct. 1624 (1995)* (internal citations omitted). Hence we must determine whether Mr. Jeronimo-Bautista's local production of pornographic images of a child substantially affects interstate commerce.

In addressing Mr. Jeronimo-Bautista's as applied challenge to the statute, the district court noted the four factors delineated by the Supreme Court in *United States v. Morrison, 529 U.S. 598, 146 L. Ed. 2d 658, 120 S. Ct. 1740 (2000)*, and in *Lopez* "for consideration in addressing the constitutionality of a statute based upon *Commerce Clause* authority." *Jeronimo-Bautista, 319 F. Supp. 2d at 1278.* [**7] The court accurately described those factors as (1) whether the prohibited activity is commercial or economic in nature; (2) whether the statute's reach was limited by an express jurisdictional element; (3) whether Congress made findings about the effects of the prohibited conduct on interstate commerce; and (4), whether there exists a link between the prohibited conduct and the effect on interstate commerce. *Id.*

Working its way through the *Lopez/Morrison* factors, the district court first rejected the argument that Mr. Jeronimo-Bautista's activity was economic in nature and, in doing so, rejected the assertion that Mr. Jeronimo-Bautista's intrastate activities could, in the aggregate, affect interstate commerce. *Id.* Second, the court determined *§ 2251(a)*'s express jurisdictional element failed "to place any meaningful restrictions on federal jurisdiction and failed to establish the link between the violation and interstate commerce." *Id. at 1280.* Third, the court was not convinced the

existence of Congressional findings regarding the child pornography industry was "sufficient, by itself, to sustain the constitutionality of *Commerce Clause* legislation [**8] as applied to the facts of this case." *Id.* (internal quotation omitted). Finally, referring back to its determination that Mr. Jeronimo-Bautista's activity could not be deemed economic in nature, the court also rejected the use of an aggregation theory to support the argument that there existed something more than only a tenuous link between Mr. Jeronimo-Bautista's prohibited activity and interstate commerce. *Id. at 1281.* The court dismissed the indictment against Mr. Jeronimo-Bautista on the grounds that as applied to the specific facts of his case, *§ 2251(a)* violated the *Commerce Clause.*

Pending this appeal, the Supreme Court decided *Gonzales v. Raich, 162 L. Ed. 2d 1, 125 S. Ct. 2195 (2005)*, in which it rejected an as applied challenge to the Controlled Substances Act (CSA), *21 U.S.C. § 801 et seq.*, and held that Congress could regulate the purely local production, possession, and use of marijuana for personal medical purposes. *Raich, 125 S. Ct. at 2215.* As we discuss in more detail below, the Court's reasoning in *Raich*, coupled with the standard four factor *Lopez/Morrison* analysis, supports [**9] our conclusion that the district court erred in concluding *§ 2251(a)* violates the *Commerce Clause* as applied to Mr. Jeronimo-Bautista.

We begin by examining the findings accompanying the comprehensive scheme developed by Congress to eliminate the production, possession, and dissemination of child pornography. When Congress first passed the Protection of [*1270] Children Against Sexual Exploitation Act of 1977, it noted "that child pornography . . . [has] become [a] highly organized, multimillion dollar industry that operates on a nationwide scale . . . [and that] the sale and distribution of such pornographic materials are carried on to a substantial extent through the mails and other instrumentalities of interstate and foreign commerce." S. REP. NO. 95-438, at 5 (1977),

reprinted in 1978 U.S.C.C.A.N. 40, 42-43. n3 Findings supporting the 1977 Act also noted that

> since the production, distribution and sale of child pornography is often a clandestine operation, it is extremely difficult to determine its full extent. At present, however, a wide variety of child pornography is available in most areas of the country. Moreover, because of the vast potential profits involved, [**10] it would appear that this sordid enterprise is growing at a rapid rate.

Id. at 43.

n3 Although we are specifically reviewing a portion of the child pornography statutes as amended in 1998, congressional findings and the legislative history supporting the statutes enacted in 1977, as well as subsequent amendments up to 1998, are relevant to our inquiry. *See Maryland v. Wirtz, 392 U.S. 183, 190 n.13, 20 L. Ed. 2d 1020, 88 S. Ct. 2017 (1968)* (noting that when Congress enacts related legislation accompanied by relevant findings, subsequent legislation is "presumably based on similar findings and purposes with respect to the areas newly covered"), *overruled on other grounds by Nat'l League of Cities v. Usery, 426 U.S. 833, 49 L. Ed. 2d 245, 96 S. Ct. 2465 (1976).*

Amendments to the Act in 1984 eliminated the requirement that "the production, receipt, transportation, or distribution of child pornography be for a 'pecuniary profit.'" *United States*

v. Morales-de Jesus, 372 F.3d 6, 11 (1st Cir. 2004). [**11] The purpose of this amendment was to eliminate an enforcement gap in the statute: "Many of the individuals who distribute materials covered [by the statute] do so by gift or exchange without any commercial motive and thus remain outside the coverage of this provision." H.R. REP. NO. 98-536, at 2 (1983), *reprinted in* 1984 U.S.C.C.A.N. 492, 493; *see also* H.R. REP. NO. 99-910, at 4 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5952, 5954 (1984 amendments sought to "eliminate the requirement that interstate distribution be for the purpose of sale; experience revealed that much if not most child pornography material is distributed through an underground network of pedophiles who exchange the material on a non-commercial basis, thus no sale is involved"). Likewise, in 1984, in support of *§ 2251*, Congress echoed its findings supporting the original 1977 legislation, stating in part that "child pornography has developed into a highly organized, multi-million-dollar industry which operates on a nationwide scale." H.R. 3635, 98th Cong. (2nd Sess. 1984); *see also* H.J. Res. 738, 99th Cong., 100 Stat. 1783 (1986) ("child exploitation has become a multi-million dollar industry, infiltrated [**12] and operated by elements of organized crime, and by a nationwide network of individuals openly advertising their desire to exploit children").

In 1996, Congress further amended the Act regarding the electronic creation of child pornography. *See Morales-de Jesus, 372 F.3d at 11.* The findings supporting those amendments noted that "the existence of . . . child pornographic images . . . inflames the desires of child molesters, pedophiles, and child pornographers who prey on children, thereby increasing the creation and distribution of child pornography . . . ." S. REP. NO. 104-358, at 2 (1996), *available at 1996 WL 506545.* Congress also stated that "prohibiting the possession and viewing of child pornography will encourage the possessors of such material to rid themselves of or destroy the material, [*1271] thereby helping to protect the victims of child pornography and to

eliminate the market for the sexual exploitative use of children . . . ." *Id.* at 3. Finally, in a 1998 amendment to the Act, a jurisdictional element was added to cover child pornography created "using materials that have been mailed, shipped, or transported in interstate or foreign commerce [**13] by any means." *§ 2251(a)*. This addition reflected Congress' concern "about federal law enforcement's current inability to prosecute 'a number of cases where the defendant produced the child pornography but did not intend to transport the images in interstate commerce." *Morales-de Jesus, 372 F.3d at 12* (quoting H.R. REP. NO. 105-557, at 27 (1998), *reprinted in* 1998 U.S.C.C.A.N. 678, 695).

In reviewing this history, we acknowledge that Congress may not have engaged in specific fact finding regarding how the intrastate production of child pornography substantially affects the larger interstate pornography market. But the Supreme Court noted in *Raich, 125 S. Ct. at 2208*, that it has "never required Congress to make particularized findings in order to legislate." Moreover, we agree with our colleagues on the First Circuit that Congress' explicit findings regarding the "extensive national market in child pornography and the need to diminish that national market" support the contention that "prohibiting the production of child pornography at the local level" helps to further the Congressional goal. *Morales-de Jesus, 372 F.3d at 12*; [**14] *see also United States v. Adams, 343 F.3d 1024, 1031-32 (9th Cir. 2003)* (outlining legislative history of child pornography statutes in rejection of *Commerce Clause* challenge); *United States v. Holston, 343 F.3d 83, 85-86 (2d Cir. 2003)* (same); *United States v. Buculei, 262 F.3d 322, 329 (4th Cir. 2001)* (same); *United States v. Kallestad, 236 F.3d 225, 229 (5th Cir. 2000)* (same); *United States v. Rodia, 194 F.3d 465, 474-75 (3d Cir. 1999)* (same).

The decision in *Raich* also supports the conclusion that Mr. Jeronimo-Bautista's production of the images in this case is economic in nature. "Economics refers to the production, distribution, and consumption of commodities." *Raich, 125 S. Ct.*

at 2211 (internal quotations omitted). The Court held that the Controlled Substances Act "is a statute that regulates the production, distribution, and consumption of commodities for which there is an established, and lucrative, interstate market. Prohibiting the intrastate possession or manufacture of an article of commerce is a rational (and commonly utilized) means of regulating commerce in that [**15] product." *Id.* The same reasoning is applicable to the intrastate production of child pornography. Like the CSA, the child pornography statutes regulate the "production, distribution, and consumption of commodities for which there is an established, and lucrative, interstate market." *Id.* Congress' prohibition against the intrastate possession or manufacture of child pornography "is a rational (and commonly utilized) means of regulating commerce in that product." *Id.*; *see also Morales-de Jesus, 372 F.3d at 12* (Congress' initial finding in 1977 that child pornography is a "'multimillion dollar industry that operates on a nationwide scale' emphasizes that the underlying activity regulated by the child pornography statutes - the production, distribution, and possession of child pornography - is commercial activity . . . ."); *Holston, 343 F.3d at 88* (finding activity covered by *§ 2251* economic in nature); *Buculei, 262 F.3d at 329* (same); *Kallestad, 236 F.3d at 228* (same regarding *§ 2252*); *Rodia, 194 F.3d at 480-81* (same).

In holding that a sufficient link existed between the local production [**16] and use of marijuana and its effect on interstate commerce, the Court in *Raich* relied extensively on *Wickard v. Filburn, 317 U.S. 111, 87 L. Ed. 122, 63 S. Ct. 82 (1942)*. In *Wickard*, [*1272] the Court upheld the Agriculture Adjustment Act of 1938, 52 Stat. 31, which permitted congressional regulation of a farmer's wholly intrastate production and consumption of wheat on his farm. *Id. at 127-29. Wickard* "establishes that Congress can regulate purely intrastate activity that is not itself 'commercial,' in that it is not produced for sale, if it concludes that failure to regulate that class of activity would undercut the regulation of the

interstate market in that commodity." *Raich, 125 S. Ct. at 2206*. The Court noted that

> in *Wickard*, we had no difficulty concluding that Congress had a rational basis for believing that, when viewed in the aggregate, leaving home-consumed wheat outside the regulatory scheme would have a substantial influence on price and market conditions. Here too, Congress had a rational basis for concluding that leaving home-consumed marijuana outside federal control would similarly affect price and market conditions. [**17]

Id. at 2207. It viewed its task as not to determine "whether respondents' activities, taken in the aggregate, substantially affect interstate commerce *in fact*, but only whether a 'rational basis' exists for so concluding." *Id. at 2208* (quoting *Lopez, 514 U.S. at 557*) (emphasis added).

Dismissing arguments that regulation of locally cultivated and possessed marijuana was beyond the "outer limits" of Congress' *Commerce Clause* authority, *id. at 2212*, the Court observed:

> one need not have a degree in economics to understand why a nationwide exemption for the vast quantity of marijuana (or other drugs) locally cultivated for personal use (which presumably would include use by friends, neighbors, and family members) may have a substantial impact on the interstate market for this

extraordinarily popular substance. The congressional judgment that an exemption for such a significant segment of the total market would undermine the orderly enforcement of the entire regulatory scheme is entitled to a strong presumption of validity. Indeed, that judgment is not only rational, but "visible to the naked eye," *Lopez, 514 U.S. at 563, 115 S. Ct. 1624,* [**18] under any commonsense appraisal of the probable consequences of such an open-ended exemption.

Id. Finally, noting the "findings in the CSA and the undisputed magnitude of the commercial market for marijuana, [the] decisions in *Wickard v. Filburn* and the later cases endorsing its reasoning," the Court concluded Congress could regulate the "intrastate, noncommercial cultivation, possession and use of marijuana." *Id. at 2215.*

This reasoning applies to the child pornography statute at issue here. Under the aggregation theory espoused in *Wickard* and in *Raich*, the intrastate production of child pornography could, in the aggregate, have [*1273] a substantial effect on the interstate market for such materials. In *Raich*, the respondents were "cultivating, for home consumption, a fungible commodity for which there [was] an established, albeit illegal, interstate market." *Id. at 2206.* Child pornography is equally fungible and there is no question an established market exists for its sale and exchange. The Court in *Raich* reasoned that where there is a high demand in the interstate market for a product, the exemption from regulation of materials produced intrastate [**19] "tends to frustrate the federal interest in eliminating commercial transactions in the interstate market in their entirety." *Id. at 2207.* For the

same reasons, *§ 2251(a)* "is squarely within Congress' commerce power because production of the commodity meant for home consumption, be it wheat . . ., marijuana [or child pornography], has a substantial effect on supply and demand in the national market for the commodity." *Id. at 2207.*

In this regard, we agree with the Second Circuit's rejection of a *Commerce Clause* challenge to *§ 2251(a)*, in which the court anticipated the analysis subsequently laid out in *Raich*. *See Holston, 343 F.3d at 90-91*. There, the court held that

> when Congress regulates a class of activities that substantially affect interstate commerce, the fact that certain intrastate activities . . . may not actually have a significant effect on interstate commerce is . . . irrelevant. Moreover, the nexus to interstate commerce . . . is determined by the class of activities regulated by the statute as a whole, not by the simple act for which an individual defendant is convicted. Where, as here, a general regulatory statute bears a substantial [**20] relation to commerce, the *de minimis* character of individual instances arising under that statute is of no consequence.

id. (internal quotations and citations omitted). Similarly, in *Morales-de Jesus, 372 F.3d at 14-17*, the First Circuit succinctly articulated how the intrastate production of child pornography could substantially impact interstate commerce under a *Wickard* aggregation analysis. The court noted that

> producing child pornography fuels

the supply side of the market . . .: by outlawing the purely local production of child pornography, Congress can curb the nationwide supply for these materials. The prohibition on intrastate production curbs the supply of child pornography at its source, before it is released into the interstate market. . . . Often, as is the case here, it is necessary to control local behavior to ensure the effectiveness of interstate regulation.

Id. at 16-17. n4

n4 *Section 2251(a)* includes a jurisdictional element as required by the *Lopez/Morrison* factors. While other courts have questioned the sufficiency of *§ 2251(a)*'s jurisdictional element, *see Morales-de Jesus, 372 F.3d at 13-14*; *Holston, 343 F.3d at 88-89*; *Rodia, 194 F.3d at 471-74*, we need not linger on this issue. In light of the Supreme Court's ruling in *Raich*, and our conclusion that the activity regulated in this case has a substantial impact on interstate commerce, any "failure of the jurisdictional element effectively to limit the reach of the statute is not determinative." *Holston, 343 F.3d at 89.*

[**21]

Mr. Jeronimo-Bautista is challenging the statute's constitutionality as applied to him. The Court in *Raich* held the plaintiffs' as applied challenges to the CSA failed because the Court had no difficulty concluding that Congress acted rationally in

> determining that [the intrastate, noncommercial, cultivation, possession, and use of marijuana for personal medical uses], whether viewed individually or in the aggregate, [did not] compel[] an exemption from the CSA; rather, this subdivided class of activities . . . was an essential part of the larger regulatory scheme.

Id. at 2211. So too in Mr. Jeronimo-Bautista's case. Congress' decision to deem illegal Mr. Jeronimo-Bautista's local production of child pornography represents a rational determination that such local activities constitute an essential part of the interstate market for child pornography that is well within Congress' power to regulate.

Concluding that *§ 2251(a)*, as applied to Mr. Jeronimo-Bautista, is a legitimate exercise of Congress' regulatory powers under the *Commerce Clause*, n5 we **REVERSE** [*1274] the district court and **REMAND** for further proceedings.

n5 In so doing, we join a number of circuits, who, prior to the Supreme Court's decision in *Gonzales v. Raich, 162 L. Ed. 2d 1, 125 S. Ct. 2195 (2005)*, rejected, under varying theories, as applied and facial challenges to the child pornography possession and production statutes. *See United States v. Morales-de Jesus, 372 F.3d 6 (1st Cir. 2004)* (rejecting facial and as applied challenges to *§ 2251(a)*); *United States v. Adams, 343 F.3d 1024 (9th Cir. 2003)* (rejecting facial challenge to *§ 2252(a)(4)(B)*); *United States v. Holston, 343 F.3d 83 (2d Cir. 2003)* (rejecting facial and as applied challenges to *§ 2251(a)*); *United States v. Buculei, 262 F.3d 322 (4th Cir. 2001)* (rejecting as applied challenge to *§*

2251(a)); *United States v. Hampton, 260 F.3d 832 (8th Cir. 2001)* (rejecting facial challenge to *§ 2251(a)* and *§ 2252(a)(4)(B)*); *United States v. Galo, 239 F.3d 572 (3d Cir. 2001)* (rejecting facial and as applied challenge to *§ 2251(a)* and *§ 2252(a)(4)(B)*); *United States v. Kallestad, 236 F.3d 225 (5th Cir. 2000)* (rejecting facial challenge to *§ 2252(a)*); *United States v. Angle, 234 F.3d 326 (7th Cir. 2000)* (rejecting facial challenge to *§ 2252(a)(4)(B)*). Recently, in *United States v. Riccardi, 405 F.3d 852 (10th Cir. 2005)*, our circuit rejected an as applied challenge to *§ 2252(a)(4)(B)*. *But see United States v. Smith, 402 F.3d 1303 (11th Cir.)* (finding *§ 2251(a)* and *§ 2252A(a)(5)(B)* unconstitutional as applied), *vacated and remanded by 162 L. Ed. 2d 863, 125 S. Ct. 2938 (2005)*; *United States v. McCoy, 323 F.3d 1114 (9th Cir. 2003)* (same as to *§ 2252(a)(4)(B)*); *United States v. Corp, 236 F.3d 325 (6th Cir. 2001)* (same).

[**22]

UNITED STATES OF AMERICA, Plaintiff, vs. VIRGILIO JERONIMO-BAUTISTA, et. al., Defendants.

Case No. 2:04-CR-81 TS

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

319 F. Supp. 2d 1272; 2004 U.S. Dist. LEXIS 10472

May 19, 2004, Decided
May 20, 2004, Filed

SUBSEQUENT HISTORY: Reversed by, Remanded by *United States v. Jeronimo-Bautista, 2005 U.S. App. LEXIS 21965 (10th Cir. Utah, Oct. 12, 2005)*

DISPOSITION: [**1] Defendant's Motion to Dismiss for Lack of Federal Jurisdiction granted. Single count of indictment dismissed.

COUNSEL: For VIRGILIO JERONIMO-BAUTISTA aka Virgilino Jeronimo, defendant: Mary C. Corporon, Ms., CORPORON & WILLIAMS PC, SALT LAKE CITY, UT.

For XAVIER LUGO-MARTINEZ aka Javier Lugo, defendant: Loni F. DeLand, SALT LAKE CITY, UT.

For ANDRES SANPEDRO-JERONIMO aka Andres Sanpedro, defendant: Richard P Mauro, Mr, SALT LAKE CITY, UT.

U. S. Attorneys: Michele M. Christiansen, US ATTORNEY'S OFFICE.

JUDGES: TED STEWART, United States District Judge.

OPINIONBY: TED STEWART

OPINION:

[*1273] MEMORANDUM DECISION AND ORDER GRANTING DEFENDANT'S MOTION TO DISMISS FOR LACK OF FEDERAL JURISDICTION AND DISMISSING INDICTMENT AGAINST DEFENDANT JERONIMO-BAUTISTA

This matter is before the Court on Defendant Virgilio Jeronimo-Bautista's Motion to Dismiss for Lack of Federal Jurisdiction, filed March 10, 2004. A hearing was held thereon on April 21, 2004. The Court, having read the pleadings and the file, having heard arguments of counsel, being otherwise [**2] fully advised, and with due deference to Congressional authority, will hereby GRANT Defendant's Motion.

I. BACKGROUND

On February 11, 2004, Defendant was charged with a

single count of Sexual Exploitation of Children, in violation of *18 U.S.C. § 2251(a)*, and *18 U.S.C. § 2* -- Aiding and Abetting. n1 On February 18, 2004, Defendant entered a plea of not guilty to the charge.

n1 Defendant was indicted with two co-defendants -- Xavier Lugo-Martinez and Andres Sanpedro-Jeronimo -- who have not joined in this Motion. In addition, Andres Sanpedro-Jeronimo was charged with a second count of Possession of an Unregistered Sawed-Off Shotgun.

Count I is the only count pending against Defendant Jeronimo-Bautista, and he is the only Defendant alleging lack of federal jurisdiction in this case. As such, the Court will hereinafter refer to Mr. Jeronimo-Bautista simply as "Defendant."

II. DISCUSSION

A. Standard of Review.

Fed. R. Crim. P. 12(b) [**3] provides for a pre-trial challenge to a defect in an indictment. Specifically with regard to whether the Court has jurisdiction, *Rule 12(b)(3)(B)* states that "at any time while the case is pending, the court may hear a claim that the indictment or information fails to invoke the court's jurisdiction . . ." "An indictment should be tested solely on the basis of the allegations made on its face, and such allegations are to be taken as true." *United States v. Hall, 20 F.3d 1084, 1087 (10th Cir. 1994)*, citing *United States v. Sampson, 371 U.S. 75, 78-79, 9 L. Ed. 2d 136, 83 S. Ct. 173 (1962)*.

For purposes of considering this Motion to Dismiss, the Court makes all factual inferences in favor of the government and assumes that the government could prove the facts alleged against Defendant at a trial held herein. In other words, the Court will assume that the government can prove the factual basis for its criminal allegations and will examine the legal sufficiency of the alleged federal jurisdiction as contained in the Indictment.

B. Findings of Fact for Purposes of this Motion to Dismiss.

Fed. R. Crim. P. 12(d) requires that, [**4] "when factual issues are involved in deciding a motion, the court must state its essential findings on the record." See Id. The Court makes the following essential findings of fact, all inferences from which are made in favor of the government, for the purposes of this Motion to Dismiss for Lack of Federal Jurisdiction. The following facts are not disputed by Defendant, for purposes of this Motion only.

On or about January 29, 2004, a Salt Lake County Sheriff's Department Deputy responded to a call from a one-hour photo laboratory in Salt Lake County -- which is located within the Central Division of the District of Utah -- to check on certain suspicious photographs that had been dropped off to be developed. The manager [*1274] of the photo lab informed the Deputy that a Hispanic male had brought in a roll of analog film to be developed earlier that evening. During the development process, an employee noticed that the photos appeared to depict the sexual assault of a minor female (hereinafter "the victim"). It was later determined that the victim was 13 years old at the time of the assault. The photos, which were confiscated by the Deputy, depicted the victim, who appeared to be unconscious [**5] or dead, n2 being sexually assaulted by multiple men. n3

n2 It was later determined that the victim was unconscious. The record is unclear as to how the victim became unconscious or whether the intoxicant employed was voluntarily ingested. However, for the purposes of the instant Motion, it is clear that the sexual assaults occurred while the victim was unconscious and while she was a minor.

n3 Several other photos on the same roll of film depict the same men standing in front of a

pick-up truck with the license plate visible on the pick-up truck. The Deputy used the license plate and the film drop-off information to assist in the location of the Defendants.

For purposes of this Motion, the Defendant concedes that, on or about January 29, 2004, Defendant and his co-defendants were in the company of the victim. At some point on the evening in question, the victim became intoxicated and/or disabled. The three Defendants and the victim were in an unoccupied private residence in Utah at the time of the assault. [**6]

While the victim was unconscious, one or more of the Defendants removed the clothing of the victim, while in the presence of one or more of the other Defendants. The Defendants had a Kodak camera which was not manufactured within the State of Utah. The Defendants and/or each of them then proceeded to take photographs of the naked victim being sexually assaulted by each of the Defendants.

It is undisputed that each of the Defendants is a citizen of Mexico and resides in the State of Utah. The victim in this case was born within the State of Utah, and she was not transported across state lines, or internationally, for purposes of engaging in the behavior in question. The photos were never disseminated, were not stored or transmitted electronically via the Internet, the United States Postal Service, nor by any other method across state lines or internationally. There is no indication that any of the Defendants had any intention of so transmitting or storing the images.

All three Defendants in this case have been charged in state court with Sexual Exploitation of a Minor. Those state criminal prosecutions are currently pending in state court and are based upon the same facts and circumstances [**7] giving rise to the criminal allegations in this federal proceeding.

C. Applicable Law.

1. Indictment.

Count I of the Indictment pending against Defendant alleges as follows:

> On or about January 29, 2004, in the Central Division of the District of Utah, VIRGILIO JERONIMO-BAUTISTA . . . defendant[] herein, did knowingly employ, use, persuade, induce, entice, and coerce a minor, A.B., to engage in sexually explicit conduct for the purpose of producing visual depictions of such conduct, which visual depictions were produced using materials that have been mailed, shipped, and transported in interstate and foreign commerce, and did aid and abet [his co-defendants] therein; all in violation of Title *18, United States Code, Sections 2251(a)* and *2* and punishable pursuant to Title *18, United States Code, Section 2251(d).*

[*1275] 2. Statute.

Defendant was indicted under *18 U.S.C. § 2251(a)*, which reads as follows:

> Any person who employs, uses, persuades, induces, entices, or coerces any minor to engage in, or who has a minor assist any other person to engage in, or who transports any minor in interstate or foreign commerce, [**8] or in any Territory or Possession of the United States, with the intent that such minor engage in, any sexually explicit conduct *for the purpose of producing any visual depiction of such conduct*, shall

be punished as provided under subsection (e), if such person knows or has reason to know that such visual depiction will be transported in interstate or foreign commerce or mailed, ***if that visual depiction was produced using materials that have been mailed, shipped, or transported in interstate or foreign commerce by any means***, including by computer, or if such visual depiction has actually been transported in interstate or foreign commerce or mailed.

(emphasis added).

The government does not allege, and the Indictment does not accuse, that Defendant knew or had reason to know that the visual depictions at issue were transported in interstate commerce, nor is it alleged that such visual depiction was actually transported in interstate commerce. Rather, federal jurisdiction is premised upon the fact that the camera used by Defendant, and the film upon which the images were recorded, previously had traveled in interstate and foreign commerce. As the government argues [**9] in its memorandum: "neither the Kodak Advantix camera or [sic] the Kodak Advantix film containing the negatives of the images were manufactured within the State of Utah, and had to cross state lines to arrive in Utah." Govt. Opposition Memo at p. 4.

Defendant contends that his alleged actions, even if proven, do not impact any federal interest or matter and do not involve any significant or substantial connection to interstate commerce. Defendant concedes that his actions may constitute a state crime (and he is being charged for such), but argues that no federal jurisdiction exists in this case.

The government counters that the statute is technically

complied with, and that its application in this case is a proper exercise of federal jurisdiction.

3. Constitutional basis

The *Commerce Clause* -- found at Section 8, clause 3 to Article I of the United States Constitution -- grants to Congress the authority "to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." Chief Justice Marshall first defined the nature of Congress' power under the *Commerce Clause* in the landmark case of *Gibbons v. Ogden, 22 U.S. 1, 9 Wheat. 1, 189-190, 6 L. Ed. 23 (1824)*: [**10] "Commerce, undoubtedly, is traffic, but it is something more: it is intercourse. It describes the commercial intercourse between nations, and parts of nations, in all its branches, and is regulated by prescribing rules for carrying on that intercourse." See also *United States v. Morrison, 529 U.S. 598, 553, 146 L. Ed. 2d 658, 120 S. Ct. 1740 (2000).*

The Supreme Court has reiterated that "the Constitution creates a Federal Government of enumerated powers." *United States v. Lopez, 514 U.S. 549, 552, 131 L. Ed. 2d 626, 115 S. Ct. 1624 (1995).* That "enumeration presupposes something *not* enumerated." *Gibbons at 195* (emphasis added). The Lopez court quoted James Madison to support the fundamental Constitutional principle that "the powers delegated by the . . . Constitution to the federal government are few and [*1276] defined. Those which are to remain in the State governments are numerous and indefinite." The Federalist No. 45, pp. 292-293. Indeed, "under our written Constitution, . . . the limitation of congressional authority is not solely a matter of legislative grace." *Morrison at 616*; See also *Lopez at 575-579.*

4. Caselaw

The Supreme Court has set forth that "due [**11] respect for the decisions of a coordinate branch of Government demands that we invalidate a congressional enactment only upon a plain showing that Congress has exceeded its constitutional bounds."

Morrison at 607, citing Lopez. Federal authority is alleged by the government to exist in this case by virtue of the *Commerce Clause*.

In Morrison, the Court recognized that "one of the few principles that has been consistent since the [Commerce] Clause was adopted," is that "the regulation and punishment of intrastate violence that is not directed at the instrumentalities, channels, or goods involved in interstate commerce has always been the province of the States." *Id. at 618*. Further, "the Constitution requires a distinction between what is truly national and what is truly local." *Id. at 617-618*. The Supreme Court has also noted that, "just as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front." *Gregory v. Ashcroft, 501 U.S. 452, 458, 115 L. Ed. 2d 410, 111 S. Ct. 2395 (1991)*. [**12]

a. *Commerce Clause* Authority

Even with the historic expansion of Congress' authority under the *Commerce Clause*, the Supreme Court has unequivocally held that "this power is subject to outer limits." *Lopez at 557*. Indeed, "the scope of the interstate commerce power 'must be considered in the light of our dual system of government and may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government.'" *Lopez at 557*, citing *Jones v. Laughlin Steel, 301 U.S. 1, 37, 81 L. Ed. 893, 57 S. Ct. 615 (1937)*. In *Maryland v. Wirtz, 392 U.S. 183, 188, 20 L. Ed. 2d 1020, 88 S. Ct. 2017 (1968)*, the Court reaffirmed that "the power to regulate commerce, though broad indeed, has limits" which the Court has "ample power" to enforce.

The Supreme Court has consistently held that there are

"three broad categories of activity that Congress may regulate under its commerce power": 1) the use of the *channels* of interstate commerce; 2) the *instrumentalities* of interstate [**13] commerce, or persons or things in interstate commerce, "even though the threat may come only from intrastate activities"; and 3) those *activities* having a substantial relation to interstate commerce. *Morrison at 609* (internal citations omitted); see also *Lopez at 558-559.*

At the outset, the Court makes the initial finding that the instant case falls within the third category -- the regulation of activities having a substantial relation to interstate commerce. The Lopez court identified that, "consistent with the great weight of our case law, . . . the proper test requires an analysis of whether the regulated activity 'substantially affects' interstate [*1277] commerce.'" *Id. at 559.*

It has never been the position of the Supreme Court that "Congress may use a relatively trivial impact on commerce as an excuse for broad general regulation of state or private activities." *Wirtz at 196, n. 27.* In order for federal jurisdiction under the *Commerce Clause* to attach, the "substantial affect" must be economic in nature. Indeed, the Morrison court stated that, "thus far in our Nation's history our cases have upheld *Commerce Clause* regulation of intrastate activity only [**14] where that activity is economic in nature." *Id. at 613.*

b. Regulation of criminal activity under the *Commerce Clause*

"Under our federal system, the 'States possess primary authority for defining and enforcing the criminal law.'" *Lopez at 561, n. 3*, quoting *Brecht v. Abrahamson, 507 U.S. 619, 635, 123 L. Ed. 2d 353, 113 S. Ct. 1710 (1993)*(internal citations partially omitted). The Supreme Court has historically held that Congress may not regulate non-economic, violent criminal conduct: "The regulation and punishment of intrastate violence that is not *directed at* the instrumentalities, channels, or goods involved in interstate commerce has always

been the province of the States." *Morrison at 618* (emphasis added).

In Morrison, the Supreme Court noted that "we can think of no better example of the police power, which the Founders denied the National Government and reposed in the States, than the suppression of violent crime and vindication of its victims." *Id. at 618.* In Lopez, it was noted that "the Constitution . . . withhold[s] from Congress a plenary police power." *Id. at 574-585.* The concurrence in Lopez noted that the Supreme Court has [**15] "*always* . . . rejected readings of the *Commerce Clause* and the scope of federal power that would permit Congress to exercise a police power." *Id. at 596-597* (emphasis in original).

"When Congress criminalizes conduct already denounced as criminal by the States, it effects a 'change in the sensitive relation between federal and state criminal jurisdiction.'" *United States v. Enmons, 410 U.S. 396, 411-412, 35 L. Ed. 2d 379, 93 S. Ct. 1007 (1973)*(internal citations omitted); See also *Lopez at 561, n. 3.*

D. Application of the law to the facts of this case

Having set forth the parameters for federal jurisdiction to vest under the *Commerce Clause*, the Court will now turn to the facts of this case.

The Court notes that the Tenth Circuit has yet to rule on this issue. While Sister Circuits have made rulings appearing at a variety of points on the *Commerce Clause* map, the Tenth Circuit has only interpreted the *Commerce Clause* under this analysis in dealing with drug and firearm cases. See, e.g. *United States v. Price, 265 F.3d 1097 (10th Cir. 2001); United States v. Haney, 264 F.3d 1161 (10th Cir. 2001).*

The issue of the constitutionality [**16] of *18 U.S.C. § 2251(a)* as applied to similar facts was recently addressed in *United States v. Matthews, 300 F. Supp.2d 1220 (N.D. Alabama 2004).* The defendant in Matthews was charged under both *§ 2251(a)* and *§ 2252* for videotaping himself engaged in various

sexual acts with a minor. In that case, the court found both statutes to be unconstitutional as applied to the facts presented.

The Matthews court accurately grasped the issue before this Court:

> No decent citizen condones . . . the sexual exploitation of minors for the satisfaction [*1278] of deviate sexual desires. That is why [the state] has criminalized the conduct charged in the Indictment. Thus, the question of whether Defendant should be subject to criminal sanctions for his actions is not the issue confronting this Court. Rather, the fundamental question raised by defendant's motion is whether Congress exceeded its powers under the *Commerce Clause of the United States Constitution* when enacting statutes which, when applied to facts such as those presented here, make the simple *intra*-state production and possession of visual depictions of a minor engaging in sexually [**17] explicit conduct a federal offense, even though those images were not mailed, shipped, or transported in interstate or foreign commerce by any means . . . and there is no evidence that the visual depictions were intended for interstate distribution or economic activity of any kind, including exchange of the pornographic [images] for other prohibited materials.

Id. at 1223-24 (emphasis in original).

The Court wishes to make it abundantly clear that the facts and nature of this crime, as stipulated to for purposes of this Motion, are shocking and abhorrent. Defendant's actions no less than stripped the humanity and innocence from a child. The Court's legal analysis on the as-applied constitutionality of this statute under the *Commerce Clause* in no way minimizes the obscene and brutal behavior of Defendant or its impact upon the victim in this case. This kind of behavior must be swiftly and justly punished to protect the victim and society at large. The question before the Court, however, is whether the Constitution of the United States intends that such conduct be deemed a federal crime thus vesting this Court with jurisdiction over this crime.

As noted, [**18] Defendant is being simultaneously prosecuted in state court on charges of Sexual Exploitation of a Minor. The Court's decision here does not render Defendant's behavior untouched by punishment.

1. Factors to Consider

The *Morrison* court delineated four factors originally set forth in *Lopez* for consideration in addressing the constitutionality of a statute based upon *Commerce Clause* authority: 1) Is the prohibited activity commercial or economic in nature? 2) Is there an express jurisdictional element involving interstate activity which might limit the statute's reach? 3) Did Congress make findings about the effects of the prohibited conduct on interstate commerce? and 4) Is the link between the prohibited activity and the effect on interstate commerce attenuated? See *United States v. Corp, 236 F.3d 325, 329 (6th Cir. 2001).*

a. Economic/commercial nature

As Lopez summarized, "where economic activity substantially affects interstate commerce, legislation regulating that activity will be sustained." *Id. at 560.* Conversely, the Supreme Court has "upheld *Commerce Clause* regulation of

intrastate activity *only where that activity is economic in* [**19] *nature." Morrison at 613* (emphasis added).

Further, the alleged economic activity cannot be considered to substantially affect interstate commerce based upon the argument that the otherwise solely intrastate activity affected interstate commerce in an *aggregate* fashion. Indeed, the Morrison Court established its outright rejection of

> the argument that Congress may regulate noneconomic, violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce. . . . In recognizing this fact, we [*1279] preserve one of the few principles that has been consistent since the Clause was adopted. The regulation and punishment of intrastate violence that is not *directed at* the instrumentalities, channels, or goods involved in interstate commerce has always been the province of the states.

Id. at 617-18 (internal citations omitted)(emphasis added), citing *Lopez at 567-68.*

In Lopez, the Court reasoned that if the regulation of intrastate possession of a weapon (and in Morrison, intrastate violent criminal conduct) is justified based upon its aggregate affect on interstate commerce, "we are hard pressed to posit any activity by [**20] an individual that Congress is *without* power to regulate." *Lopez at 564*; *Morrison at 613* (emphasis added).

The Court agrees with the holding in *Matthews*: "Although some, if not most, child pornography may certainly be the product of commercial enterprise, it does not follow that *all* child pornography is the

product of, or intended for distribution in, a market pandering to other perverts. The exploitation of a minor in home-produced [] recording of sexual acts is, unquestionably, despicable; but when it is done with no intention to sell, distribute, or exchange the tapes thus produced it is not 'commerce.'" *Id. at 1228.*

The Lopez decision itself was based upon the holding that the mere possession of a prohibited object does not necessarily render it "commercial" in nature, and thereby subject to Congressional regulation under the *Commerce Clause*. It is difficult to conceive of an activity any less commercial that the "simple local possession of a good produced for personal use only." *United States v. Kallestad, 236 F.3d 225, 231 (5th Cir. 2000)* (Jolly, J., dissenting).

In sum, the Court cannot make the finding that the facts here constitute [**21] an economic activity that, through repetition elsewhere, may substantially affect interstate commerce. See *Lopez at 563-67.*

b. Limiting, express jurisdictional element

In determining the constitutionality of a statute under *Commerce Clause* authority, a Court should consider whether the statute contains a "jurisdictional element which would ensure, through case-by-case inquiry, that the [violation] in question affects interstate commerce." *Lopez at 561.* "A jurisdictional element, as the term has been used in and after Lopez, refers to a provision in a federal statute that requires the government to establish specific facts justifying the exercise of federal jurisdiction in connection with any individual application of the statute." *United States v. Rodia, 194 F.3d 465, 471 (3rd Cir. 1999)*(internal citations omitted).

"The mere presence of a jurisdictional element . . . does not in and of itself insulate a statute from judicial scrutiny under the *Commerce Clause*, or render it per se constitutional. To the contrary, courts must inquire further to determine whether the jurisdictional element has the requisite nexus

with interstate commerce. We must, [**22] therefore, determine whether the jurisdictional component in this case limits the statute to items that have an explicit connection with, or effect upon, interstate commerce." *United States v. Bishop, 66 F.3d 569, 585 (3rd Cir. 1995).*

Although the Rodia court upheld the constitutionality of a similar statute on other grounds, with respect to the jurisdictional element, the court found that the element did not pass constitutional muster by itself. "As a practical matter, the limiting jurisdictional factor is almost useless [*1280] here, since all but the most self-sufficient child pornographers will rely on film, cameras, or chemicals that traveled in interstate commerce and will therefore fall within the sweep of the statute." *Id. at 473.*

The "jurisdictional hook" which the government argues attaches here is that the camera and film used by Defendant incidental to his state crime had moved in interstate and foreign commerce prior to the date on which those objects were used to capture the visual depictions of Defendant engaging in sexually explicit conduct with the minor victim. This so-called "limiting" jurisdictional provision, as it applies to this case, fails [**23] to place any meaningful restrictions on federal jurisdiction and fails to establish the link between the violation and interstate commerce.

The Court finds that the jurisdictional element here fails to adequately perform the "function of guaranteeing the final product regulated substantially affects interstate commerce." Id. Further, there is nothing in this element that "ensure[s], through case-by-case inquiry, that the [violation] in question affects interstate commerce." *Lopez at 561.*

c. Congressional findings

Congress made specific findings when they passed the statute in question. Among those findings are: "child exploitation has become a multi-million dollar industry, infiltrated and operated by elements of organized crime, and by a nationwide network of individuals openly advertising

their desire to exploit children;" "child pornography has developed into a highly organized, multi-million-dollar industry which operates on a nationwide scale;" and "the use of children as subjects of pornographic materials is harmful to the physiological, emotional, and mental health of the individual child and to society." See Pub. L. No. 99-500, 98-292.

However, the mere [**24] existence of such Congressional findings "is not sufficient, by itself, to sustain the constitutionality of *Commerce Clause* legislation" as applied to the facts of this case. *Morrison at 614*. It is within the sound judgment of the judiciary to determine whether the intrastate activity "affect[s] interstate commerce sufficiently to come under the constitutional power of Congress to regulate them." Id., quoting *Lopez at 557, n. 2*.

As applied to Defendant in this case, the statute in question exceeds the authority expressly enumerated to Congress by the *Commerce Clause*. It is undisputed that no actual visual depictions of the victim were mailed, shipped, or transported in interstate or foreign commerce. There is no allegation that Defendant intended to sell, distribute, or exchange the images in any market -- state, local or foreign. There is also no allegation that the images were ever intended to enter the national child pornography industry that was the concern of Congress when enacting *§ 2251*. See *Matthews at 1232*.

The Court agrees with the *Matthews* court in finding that "no legislative findings exist with respect to the interstate effects of the strictly [**25] intra-state, non-commercial, production and possession of the [visual depictions] at issue here. As such, the court cannot find that the intra-state conduct for which defendant has been prosecuted had a 'substantial' effect on interstate commerce, based upon legislative history or congressional pronouncements." Id.

d. Attenuated link

The Court has already made numerous references to what it considers to be a tenuous link between the conduct at issue in

this case and the exercise of federal jurisdiction over it. The government has failed to establish a sufficient link or nexus [*1281] between the charged conduct and its effect on interstate commerce. Furthermore, such a link must be "substantial." See Lopez.

The link argued by the government is so tenuous as to render it meaningless in this case, in light of the restrictions on *Commerce Clause* authority recently reiterated in *Lopez* and *Morrison*. The only bridge the Court can surmise between the Defendant's actions in this case and the harms identified by Congress to justify federal jurisdiction here would be based on the aggregation of local effects. Outside of that already rejected theory, it cannot be said that Defendant's [**26] actions here had a "substantial effect" on interstate commerce.

"To allow Congress to regulate local crime on a theory of its aggregate effect on the national economy would give Congress a free hand to regulate any activity, since, in the modern world, virtually all crimes have at least some attenuated impact on the national economy. . . . Furthermore, it would transfer to Congress a general police power that the Constitution denies the federal government and reposes in the states." *United States v. Ballinger, 312 F.3d 1264, 1271 (11th Cir. 2002)*(citing *Morrison at 615*).

The State of Utah has already exercised its sound discretion and authority in making it a crime to engage in the acts charged in the Indictment in this case. "When Congress criminalizes conduct already denounced as criminal by the States, it affects a change in the sensitive relation between federal and state criminal jurisdiction." *Lopez at 561, n.3.*

The Matthews court reasoned as follows:

> If Congress can regulate the making and possession of child pornography under the facts presented in this case, then there is nothing outside the purview of

> congressional regulation, "even [**27] in areas such as criminal law enforcement or education where States historically have been sovereign." Despite Congress's admirable goal of stamping out the reprehensible activity surrounding the creation of child pornography, the court is mindful of its "duty to recognize meaningful limits on the commerce power of Congress."

Id. at 1233 (citing *Lopez at 564* and *580*, respectively).

The government's position that the incidental use of a camera that previously crossed state lines supports an exercise of federal jurisdiction under the *Commerce Clause* represents a marked expansion of federal authority based upon what the Court views as a tenuous link. Technical compliance, as the Supreme Court illustrated in both Lopez and Morrison, does not necessarily mean substantive compliance with the restrictions on *Commerce Clause* authority.

The question of the appropriate reach of federal jurisdiction under the *Commerce Clause* "is necessarily one of degree." *Laughlin Steel at 37*. Consider the following:

> There is a view of causation that would obliterate the distinction between what is national and what is local in the activities of commerce. Motion at the outer [**28] rim is communicated perceptibly, though minutely, to recording instruments at the center. A society such as ours 'is an elastic medium which transmits all tremors throughout its territory; the

only question is of their size.'

A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 554, 79 L. Ed. 1570, 55 S. Ct. 837 (1935) (Cardozo, J., concurring) (internal citations omitted). This "size" or degree of the link here is not sufficient to uphold federal jurisdiction in this case.

2. Meaningful limits

The statute in question -- *18 U.S.C. § 2251(a)* -- is commonly applied to the sexual [*1282] exploitation of minors by way of technological or electronic means, which more readily implicate the crossing and state and even national boundaries, but there is nothing inherent in the statute that would require such a limitation. At the hearing in this matter, the Court inquired of the parties about other acts which may technically fall within the statute. The statute only requires that the "visual depiction [of a minor engaged in sexually explicit conduct] was produced using materials that have been mailed, shipped, or transported in interstate or foreign [**29] commerce by any means . . . " It is logically conceivable that a person could create a "visual depiction" of a nude minor child using materials -- such as a paper and pen or canvas and paint -- that have crossed state lines and thus fall within the statute. n4

n4 When posed with this question, counsel for the government countered that such an image would not fall within the statutory definition of "child pornography." However, the portion of the statute in question does not require that the "visual depiction" meet that definition.

The Court must ask, what meaningful limit -- outside of "legislative grace" and charging discretion on the part of the government -- is there on the exercise of Congress' commerce power within this statute?

The gravamen of this offense is the personal, violent and sexual assault against the victim -- all serious violations of

state criminal law. The fact that the camera and film, at some point prior to this offense, traveled in interstate commerce is a stretch, indeed, to establish [**30] federal jurisdiction in this case.

As established, the *Commerce Clause* is, by constitutional design, limited in its grasp. To hold that the application of this statute to these facts is valid and constitutional would be to say that the *Commerce Clause* has a virtually unlimited scope. It follows, then, that the statute, as applied to the facts of this case, is unconstitutional.

The Court finds that Defendant's actions in this case, despicable as they may be, are "in no sense an economic activity that might, through repetition elsewhere, substantially affect any sort of interstate commerce." *Lopez at 567*. As such, there does not exist the required nexus to establish federal jurisdiction under the *Commerce Clause* in this case.

The Court here, in the light of *Lopez* and *Morrison*, believes that, to find otherwise under these facts, would be to "conclude that the Constitution's enumeration of powers does not presuppose something not enumerated and that there never will be a distinction between what is truly national and what is truly local." Id. In such violence to the first principles of the Constitution, the Court does not wish to join.

E. Finding of unconstitutional [**31] "as applied"

The Court hereby finds that the statute in question -- *18 U.S.C. § 2251(a)* -- is unconstitutional, as applied to the facts of this case. Defendant's activity was not of a type demonstrated to be *substantially* connected or related to interstate commerce on the facts of this case. The Court is not persuaded that a sufficient nexus with interstate commerce has been established to warrant such a bold expansion of federal jurisdiction in a matter historically reserved to the States.

As noted, Count I is the only count pending against Defendant. Therefore, given the Court's finding of the

unconstitutionality of *18 U.S.C. § 2251(a)* n5 as applied [*1283] to the facts of this case, the Court must also dismiss the Indictment against Defendant.

n5 Defendant has also been indicted under *18 U.S.C. § 2* -- Aiding and Abetting. However, the Court's finding here negates any possibility that Defendant could be found to have aided and abetted in the violation of an unconstitutional, as-applied, statute.

[**32]

III. CONCLUSION

Based upon the above, it is hereby

ORDERED that Defendant's Motion to Dismiss for Lack of Federal Jurisdiction is GRANTED; it is further

ORDERED that the single count of the Indictment -- Count I, Sexual Exploitation of Children in violation of *18 U.S.C. § 2251(a)* -- pending against Defendant Virgilio Jeronimo-Bautista is DISMISSED.

SO ORDERED.

DATED this 19th day of May, 2004.

BY THE COURT:

TED STEWART

United States District Judge

REPRINTED COPY

(3)

Supreme Court, U.S.
FILED
MAR 15 2006
OFFICE OF THE CLERK

No. 05-877

In the Supreme Court of the United States

VIRGILIO JERONIMO-BAUTISTA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

PAUL D. CLEMENT
Solicitor General
Counsel of Record

ALICE S. FISHER
Assistant Attorney General

JEFFREY P. SINGDAHLSEN
Attorney

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether 18 U.S.C. 2251(a) is unconstitutional, as exceeding Congress's powers under the Commerce Clause, as applied to petitioner's alleged intrastate sexual exploitation of a child for the production of child pornography, where the materials used to produce that child pornography have moved in interstate or foreign commerce, but the pornographic images themselves have neither moved in nor been shown to have been intended for sale or distribution in interstate or foreign commerce.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statement 1
Argument 5
Conclusion 10

TABLE OF AUTHORITIES

Cases:

Blackwell v. *United States*, 541 U.S. 905 (2004) 5
Brotherhood of Locomotive Firemen v. *Bangor Aroostook R.R.*, 389 U.S. 327 (1967) 5
Colburn v. *United States*, 125 S. Ct. 2934 (2005) 5
Gonzales v. *Raich*, 125 S. Ct. 2195 (2005) 3, 4, 6
Hamilton-Brown Shoe Co. v. *Wolf Bros. & Co.*, 240 U.S. 251 (1916) 5
Riccardi v. *United States*, 126 S. Ct. 299 (2005) 5
Sharpley v. *United States*, 126 S. Ct. 78 (2005) 5
United States v. *Adams*, 343 F.3d 1024 (9th Cir. 2003), cert. denied, 542 U.S. 921 (2004) 8
United States v. *Andrews*, 383 F.3d 374 (6th Cir. 2004), cert. denied, 125 S. Ct. 1693 (2005) 7, 8
United States v. *Angle*, 234 F.3d 326 (7th Cir. 2000), cert. denied, 533 U.S. 932 (2001) 7
United States v. *Corp*, 236 F.3d 325 (6th Cir. 2001) 5, 7, 8
United States v. *Forrest*, 429 F.3d 73 (4th Cir. 2005) 6

Cases—Continued: Page

United States v. *Gann*, No. 04-5840, 2005 WL 3528917 (6th Cir. Dec. 21, 2005) 8, 9

United States v. *Hampton*, 260 F.3d 832 (8th Cir. 2001), cert. denied, 535 U.S. 1058 (2002) 7

United States v. *Harris*, 358 F.3d 221 (2d Cir. 2004) 6, 7

United States v. *Holston*, 343 F.3d 83 (2d Cir. 2003) 7, 9

United States v. *Kallestad*, 236 F.3d 225 (5th Cir. 2000) 6, 7

United States v. *Matthews*, 143 F. App'x 298 (11th Cir. 2005) 7

United States v. *Maxwell*, 386 F.3d 1042 (11th Cir. 2004), vacated and remanded, 126 S. Ct. 321 (2005) 7

United States v. *McCoy*, 323 F.3d 1114 (9th Cir. 2003) 5, 8

United States v. *Morales-De Jesus*:

372 F.3d 6 (1st Cir. 2004), cert. denied, 125 S. Ct. 2929 (2005) 7

125 S. Ct. 2929 (2005) 5

United States v. *Rodia*, 194 F.3d 465 (3d Cir. 1999), cert. denied, 529 U.S. 1131 (2000) 7

United States v. *Smith*, 402 F.3d 1303 (11th Cir.), vacated and remanded, 125 S. Ct. 2938 (2005) 7

United States v. *Tashbook*, 144 F. App'x 610 (9th Cir. 2005), cert. denied, 126 S. Ct. 777 (2005) 9

Case—Continued: Page

Virginia Military Inst. v. *United States*, 508 U.S. 946 (1993) 5

Constitution and statutes:

U.S. Const. Art. 1, § 8, Cl. 3 (Commerce Clause) 2, 3, 8
Controlled Substances Act, 21 U.S.C. 801 *et seq.* 3
18 U.S.C. 2251(a) 2, 3, 5, 6, 9, 10
18 U.S.C. 2252(a)(4)(B) 7, 9

In the Supreme Court of the United States

No. 05-877

VIRGILIO JERONIMO-BAUTISTA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 24-40) is reported at 425 F.3d 1266. The opinion of the district court (Pet. App. 41-62) is reported at 319 F. Supp. 2d 1272.

JURISDICTION

The judgment of the court of appeals was entered on October 12, 2005. The petition for a writ of certiorari was filed on January 6, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner was indicted in the United States District Court for the District of Utah on one count of inducing a minor "to engage in sexually explicit conduct for the purpose of producing visual depictions of such conduct,

which visual depictions were produced using materials that had been * * * transported in interstate and foreign commerce," in violation of 18 U.S.C. 2251(a). 02/11/04 Indictment 1-2 (Count 1). Before trial, the district court dismissed the indictment on the ground that Section 2251(a), as applied to petitioner, exceeded Congress's authority under the Commerce Clause. See Pet. App. 25. The court of appeals reversed the district court's dismissal of the indictment and remanded the case for further proceedings. *Id.* at 24-40.

1. The government alleged in the district court that on January 29, 2004, petitioner and two other men entered a vacant residence in Magna, Utah, accompanied by a 13-year-old girl. At some point during the evening, the girl became unconscious, apparently after ingesting an intoxicating substance. After the girl lost consciousness, the men took off her clothes. They subsequently photographed the victim as she was being sexually assaulted by each of the men. The camera and film used to take the photographs were manufactured outside of Utah. Pet. App. 26, 45, 47.

One of the men took the film to a one-hour photo laboratory for processing. In the course of developing the film, the laboratory staff noticed that some of the photographs depicted the sexual assault of a minor. The manager called the police, and petitioner and the other two men were subsequently arrested. Pet. App. 26.

2. On February 11, 2004, a federal grand jury returned an indictment charging petitioner and the other two men with inducing a minor "to engage in sexually explicit conduct for the purpose of producing visual depictions of such conduct, which visual depictions were produced using materials that had been * * * transported in interstate and foreign commerce," in violation

of 18 U.S.C. 2251(a). 02/11/04 Indictment 1-2 (Count 1). The government alleged that the camera and film had traveled in interstate or foreign commerce. Pet. App. 47. The government did not contend that the defendants or the victim had crossed state lines in connection with the offense. Nor did the government contend that the sexually explicit photographs of the victim were, or were intended to be, sold or distributed through interstate or foreign commerce. *Id.* at 26, 45, 47.

Before trial, petitioner moved to dismiss the indictment, arguing that Congress lacks the authority under the Commerce Clause to prohibit the conduct with which he is charged. Pet. App. 25. The district court granted the motion, holding that Section 2251(a) is unconstitutional as applied to petitioner's alleged offense. *Id.* at 41-62. The court concluded that the intrastate production of child pornography for personal consumption is not economic activity, *id.* at 54-55; that Section 2251(a)'s jurisdictional element fails to ensure that the proscribed conduct bore a constitutionally sufficient nexus to interstate commerce, *id.* at 55-56; that Congress's findings about the sizeable interstate market in child pornography did not justify application of the statute to petitioner's own conduct, *id.* at 56-57; and that the link between petitioner's conduct and interstate commerce was too tenuous to support the exercise of Commerce Clause authority, *id.* at 57-60.

3. During the pendency of the government's appeal from the dismissal of petitioner's indictment, this Court issued its decision in *Gonzales* v. *Raich*, 125 S. Ct. 2195 (2005). The Court in *Raich* considered and rejected the plaintiffs' claim that the Controlled Substances Act (CSA), 21U.S.C. 801 *et seq.*, "as applied to the intrastate manufacture and possession of marijuana for medical

purposes pursuant to California law exceeds Congress' authority under the Commerce Clause." 125 S. Ct. at 2205. The Court explained that "Congress can regulate purely intrastate activity that is not itself 'commercial,' in that it is not produced for sale, if it concludes that failure to regulate that class of activity would undercut the regulation of the interstate market in that commodity." *Id.* at 2206. The Court concluded that "Congress had a rational basis for believing that failure to regulate the intrastate manufacture and possession of marijuana would leave a gaping hole in the" applicable federal scheme. *Id.* at 2209.

4. The court of appeals reversed the dismissal of petitioner's indictment and remanded the case for further proceedings. Pet. App. 24-40. The court noted that this Court in *Raich* had "rejected an as applied challenge to the [CSA]" and had "held that Congress could regulate the purely local production, possession, and use of marijuana for personal medical purposes." *Id.* at 30. The *Raich* Court's analysis, the court explained, is equally applicable to the local production of child pornography for personal consumption. *Id.* at 33-40. Like the CSA, the federal child-pornography statutes "regulate the 'production, distribution, and consumption of commodities for which there is an established, and lucrative, interstate market.' Congress' prohibition against the intrastate possession or manufacture of child pornography 'is a rational (and commonly utilized) means of regulating commerce in that product.'" *Id.* at 34 (quoting *Raich*, 125 S. Ct. at 2211). The court of appeals further observed that "Congress' explicit findings regarding the extensive national market in child pornography and the need to diminish that national market support the contention that prohibiting the production of child pornog-

raphy at the local level helps to further the Congressional goal." *Id.* at 33 (citation and internal quotation marks omitted).

ARGUMENT

Petitioner's as-applied constitutional challenge to 18 U.S.C. 2251(a) (Pet. 8-22) lacks merit and does not warrant this Court's review. Petitioner principally contends that the court of appeals' ruling in this case conflicts with the decisions in *United States* v. *Corp*, 236 F.3d 325 (6th Cir. 2001), and *United States* v. *McCoy*, 323 F.3d 1114 (9th Cir. 2003). This Court has repeatedly denied petitions for writs of certiorari in which decisions of various courts of appeals were alleged to conflict with *Corp* and *McCoy*. See, *e.g.*, *Riccardi* v. *United States*, 126 S. Ct. 299 (2005); *Sharpley* v. *United States*, 126 S. Ct. 78 (2005); *Colburn* v. *United States*, 125 S. Ct. 2934 (2005); *Morales-De Jesus* v. *United States*, 125 S. Ct. 2929 (2005); *Blackwell* v. *United States*, 541 U.S. 905 (2004). There is no reason for a different result here.

1. The court of appeals did not purport to decide whether petitioner is guilty of the charged offense, but simply reversed the district court's dismissal of petitioner's indictment and remanded the case for further proceedings. See Pet. App. 39. The interlocutory posture of the case "alone furnishe[s] sufficient ground for the denial" of the petition. *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916); accord *Brotherhood of Locomotive Firemen* v. *Bangor & Aroostook R.R.*, 389 U.S. 327, 328 (1967) (per curiam); *Virginia Military Inst.* v. *United States*, 508 U.S. 946 (1993) (opinion of Scalia, J., respecting the denial of the petition for writ of certiorari). If petitioner is acquitted following a trial on the merits, his constitutional claim will

become moot. If he is convicted, he will be entitled to reassert his current challenge to the application of 18 U.S.C. 2251(a), in addition to any other claims he may have at that time.

2. As the court of appeals correctly held, this Court's analysis of the CSA in *Raich* is equally applicable to Congress's regulation of child pornography. See Pet. App. 34-39; *United States* v. *Forrest*, 429 F.3d 73, 78-79 (4th Cir. 2005). Like the prohibition on intrastate possession of marijuana that was upheld in *Raich*, 18 U.S.C. 2251(a) is part of "comprehensive legislation to regulate the interstate market in a fungible commodity." 125 S. Ct. at 2209. Congress could rationally conclude that failure to regulate local production of child pornography would undercut its effort to eliminate that national market. See Pet. App. 39; *Forrest*, 429 F.3d at 78-79. As with the CSA, moreover, Congress's approach to the regulation of child pornography is supported by the potential difficulty of proving that particular images have previously traveled across state lines or are intended for sale or distribution in interstate or foreign commerce. See, *e.g.*, *United States* v. *Kallestad*, 236 F.3d 225, 230 (5th Cir. 2000) ("[B]ecause it may often be impossible to determine whether a specific piece of child pornography has moved in interstate commerce[,] * * * Congress could rationally determine that banning purely local possession was a necessary adjunct to its effort to ban interstate traffic."); *United States* v. *Harris*, 358 F.3d 221, 222 (2d Cir. 2004) (explaining that regulation of intrastate possession is supported by the fact that "much of the child pornography that concerned Congress is homegrown, untraceable, and enters the national market surreptitiously") (quoting *United States* v. *Holston*, 343 F.3d 83, 89 (2d Cir. 2003)).